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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER JAMES WELKER, Defendant and Appellant.	E050990 (Super.Ct.No. SWF026740) OPINION

APPEAL from the Superior Court of Riverside County. Robert E. Law, Judge. (Retired Judge of the former Mun. Ct. for the Orange Jud. Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Angelyn Gates for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., Kyle Niki Shaffer, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Christopher James Welker of receiving stolen property (Pen. Code, § 496), for which the trial court sentenced him to 16 months

in prison. Defendant argues: (1) the trial court erred when it allowed the jury to know that he had a prior conviction for receiving stolen property; and (2) the trial court erred when it allowed the prosecution to argue that defendant may also have committed burglary, and the prosecution committed misconduct when it elicited testimony that defendant possessed burglary tools. As discussed *post*, we reject these arguments and affirm the conviction.

STATEMENT OF FACTS AND PROCEDURE

A family left their home in Corona Del Mar to go on vacation on September 12, 2008. Early in the morning on September 14, they received a telephone call telling them that their home had been broken into. They returned home to find it had been ransacked. The thieves had gained entrance by forcing open the side door to the garage. Items stolen from the home included several computers, jewelry, air soft guns, souvenirs and sports memorabilia. The estimated value was $5,000 to $10,000.

Later that evening, the homeowners received a call from the Lake Elsinore Police Department. Most of their stolen items had been recovered from a vehicle defendant was driving. The homeowners did not know defendant or his codefendant, Brent McMillan, and had not given them permission to remove the items from their home.

On September 13, 2008, near midnight, a sheriff's deputy with the Lake Elsinore Police Department pulled over a black Ford Mustang because it had no front license plate. Defendant was driving the car and McMillan was in the front passenger seat. The deputy asked the men what they were doing, and they stated they had been painting and were coming home from Home Depot. The deputy did not see any painting supplies in

the vehicle, and defendant was sweating even though it was a cool evening. The deputy did not observe any paint on defendant's person. The deputy asked for permission to search the vehicle. Defendant consented.

Inside the car, the deputy found two pair of black gloves, two ski masks, a pair of binoculars and, in the backseat, a large black suitcase. Defendant told the deputy that the suitcase was his and contained junk jewelry he had purchased for his daughter. The suitcase actually contained personal items[1] that had been stolen from the Corona Del Mar home that evening, some of which were marked with the family's name. The deputy asked defendant if he had anything in the trunk, and defendant replied that the trunk contained his two laptop computers. Upon opening the trunk, the deputy found five laptop computers,[2] purses, an air soft rifle, a ladder, a saw, a black hooded sweatshirt that was wet, and a pair of night-vision binoculars. The search did not reveal any painting supplies or other items that were consistent with defendant's explanation that he and McMillan had been painting and were returning home from Home Depot.

On February 6, 2009, the People filed an information charging defendant and McMillan with receiving stolen property.

On December 14, 2009, the trial court held a hearing on the People's motion in limine seeking to admit evidence of defendant's 2007 conviction for receiving stolen

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[1] The personal items included sports memorabilia, jewelry, and air soft pistols.

[2] Another deputy turned on each of the laptop computers. The first screen to pop up on all or most of the computers contained the login names of the family who lived in the Corona Del Mar home that had been burglarized.

property pursuant to Evidence Code section 1101, subdivision (b). The trial court granted the motion.

At trial, a detective from the Palos Verdes Estates Police Department testified that on the night of June 2, 2007, she stopped a vehicle driven by defendant. She had seen the vehicle parked in a residential neighborhood and approached it. The vehicle did not have a front license plate. The vehicle drove away and the deputy began pursuit. The vehicle eventually stopped; the driver got out and fled. The passenger jumped into the driver's seat and the pursuit continued. At some point, the vehicle stopped and defendant got out. Inside the vehicle, the detective found numerous tools, a face mask, and various personal items that had been stolen, including purses and jewelry. Defendant told the deputy that the other person in the car, who had fled, was an acquaintance named Mark. The trial court later read a stipulation to the jury stating that, as a result of that stop, defendant pled no contest to receiving stolen property.

McMillan, defendant's codefendant and brother-in-law, testified that he had already pled guilty in this matter to receiving stolen property and was incarcerated. He testified that he had arranged to meet at Home Depot with a man named Mark, who was going to sell him some stolen computers. Mark also sold him a suitcase full of items that belonged to Mark's wife. McMillan asked defendant for a ride to the meeting, but did not tell him that the computers were stolen. Defendant was not part of the transaction and did not know the items were stolen. On cross-examination, McMillan admitted that he had told the arresting deputy that the suitcase full of stolen items was already in defendant's car when he had gotten into it earlier in the evening. He also stated that he

was close to defendant, that they tried to spend a lot of time together, and defendant often gave him rides and work.

On December 15, 2009, the jury found defendant guilty as charged. On May 21, 2010, the trial court sentenced him to the low term of 16 months in prison. This appeal followed.

DISCUSSION

1. *Admission of 2007 Conviction for Receiving Stolen Property*

At trial, after each party had rested its case, the parties stipulated to the following, which was read to the jury: ". . . the defendant pled no contest[3] to violating Section 496(a) of the Penal Code, receiving stolen property, to wit, designer purses and miscellaneous property on June 2, 2007." This evidence and the testimony of the arresting officer in the 2007 case were offered to prove that defendant knew the items in the car he was driving were stolen.[4] This evidence contradicted McMillan's testimony that he purchased the stolen computers and suitcase contents from a man named "Mark,"

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[3] The legal effect of a no contest plea to a crime punishable as a felony is the same as that of a plea of guilty for all purposes. A guilty plea admits every element of the crime. (*People v. Wallace* (2004) 33 Cal.4th 738, 749; Pen. Code, § 1016, subd. (3).)

[4] The prosecutor argued to the jury that in 2007, defendant admitted to knowing the property he possessed was stolen, and that this supports an inference that he knew the property he possessed in this case was stolen: "We have the fact that the defendant was caught in a similar situation back in 2007. . . . [H]e was found in a car with purses, electronics, personal items, jewelry, other miscellaneous stolen property [and] he was convicted of possessing stolen property at that time. [¶] He was convicted per his plea, per his admission that he possessed the property and that he knew it was stolen at the time he possessed it. So only one year later he is found in a car with a bunch of stolen property. The only reasonable conclusion is that he knew that the property was stolen."

and that McMillan did not tell appellant the items were stolen when he asked appellant for a ride to meet Mark.

Defendant argues the trial court committed error when it admitted evidence of his 2007 conviction under Evidence Code section 1101, subdivision (b). This is because, defendant argues, the evidence of the very similar prior crime could logically be used only as propensity evidence, which is prohibited by Evidence Code section 1101. Defendant argues that his knowledge that the personal property found in the car he was driving in 2007 was stolen could have no possible nexus with any knowledge that the personal property found in the car he was driving in 2008 was stolen. In other words, defendant argues the court erred by admitting propensity evidence disguised as evidence of knowledge.

Evidence Code section 1101, subdivision (b) (hereafter section 1101(b)), provides that evidence that a person committed a crime, civil wrong or other act is admissible when relevant to prove some fact other than the person's disposition to commit such an act. Such evidence may be admitted to prove the person's knowledge of relevant facts, among other things. (§ 1101(b).) To be admissible, the evidence must be relevant to some material fact that is in issue, must have a tendency to prove that fact, and must not contravene other policies limiting admission, such as Evidence Code section 352. (*People v. Thompson* (1988) 45 Cal.3d 86, 109.) We review a trial court's ruling under Evidence Code sections 1101(b) and 352 for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

The Evidence Code defines "relevant evidence" to include evidence "having any tendency in reason to prove . . . any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "In ascertaining whether evidence of other crimes has a tendency to prove the material fact, the court must first determine whether or not the uncharged offense serves ' "logically, naturally, and by reasonable inference' " to establish that fact. [Citation.] The court '. . . must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong.' [Citation.] If the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded." (*People v. Thompson* (1980) 27 Cal.3d 303, 315, fns. omitted (*Thompson*), overruled on another ground in *People v. Scott* (2011) 52 Cal.4th 452.)

At oral argument, counsel for defendant pressed quite forcefully her point that the opinion in *Thompson* prohibits the use of defendant's knowledge in the 2007 crime to establish his knowledge in the 2008 crime. In *Thompson*, the jury convicted the defendant of capital murder based on the defendant's shooting of the victim during what appeared to be a burglary and robbery. The murder would not have been a capital crime if the jury had not found it had taken place during the commission and attempted commission of a burglary and robbery. As the defendant held the murder victim and his fiancé at gunpoint, he ignored their offers to give him cash and a $6,000 ring, but did take the victim's car keys. The defendant told the murder victim's fiancé, "You know why

I'm here and you know who sent me," before firing three shots into each of them.[5] (*Thompson*, *supra*, 27 Cal.3d at p. 312.) The defendant discarded the car keys without using them. In order to prove that the defendant entered the victims' home with the intent to steal from them, the People successfully sought to introduce evidence that two weeks after the murder, defendant held up at gunpoint a restaurant employee as the employee approached his car in the parking lot after closing up. The defendant wanted the employee to go back inside the restaurant to obtain money, but the employee said he did not have a key. The defendant settled for taking the employee's wallet and car keys, and then drove out of the parking lot in the employee's car. Our Supreme Court concluded that the probative value of the parking lot robbery was considerably lessened because the two crimes lacked sufficient similarity and that, "Evidence that an individual intended to steal car keys on one occasion does not, *by itself*, substantially tend to prove that he intended to steal them on a second occasion." (*Id*. at p. 322, italics added.) The court found the proffered evidence tended only to prove the defendant's general disposition to commit a theft crime, not his specific intent to commit a theft crime when he confronted the victims. (*Id.* at pp. 320-321.)

Defendant argues that in the present matter, as in *Thompson*, defendant's knowledge of the stolen nature of the items in 2007 does not have a tendency to prove his knowledge of the stolen nature of the items in the 2008 crime. Defendant's entire

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[5] The surviving victim believed her estranged husband had hired defendant to murder her and her fiancé, but the crime was not charged as a murder for hire.

argument applying the above law to the facts of this case on this key point is reproduced verbatim from his opening brief:

"As indicated above, in order for the evidence of [defendant's] prior conduct to be admissible to prove 'knowledge,' it must logically, naturally, and by reasonable inference, establish [defendant's] knowledge on the date in question. As the California Supreme Court has instructed, if the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.

"There is no clear and reliable means by which it can be asserted that because [defendant] was, in the past, charged with, and plead 'No Contest' to Receiving Stolen Property, that he, therefore, knew the property for which he had possession on the date in question, was stolen. The ONLY possible way in which a finder of fact could utilize such information would be to conclude that because he was convicted of similar behavior in the past, he must have done so in the present case, therefore, he 'knew' the property in the present case was stolen.

"For this reason, the evidence of [defendant's] prior conduct should have been excluded when offered to prove 'knowledge.' "

Defendant's application of the law to the facts of this case ignores the key distinction between *Thompson* and this case—the connection between the uncharged offense and the ultimate fact in dispute here is quite clear. In the uncharged offense, defendant was pulled over at night in a car missing a front license plate; in the car were found numerous personal items that appeared to have been stolen, including 11 purses, a digital camera, a video camera, an iPod, a Blackberry, and cufflinks. Numerous tools

were also found in the vehicle, including a sledgehammer, a dolly, a wrench, pliers, screwdrivers, leather gloves, a fabric face mask, and a loaded firearm with extra rounds that had been stolen in a residential burglary. In the current matter, in which the defendant placed at issue whether he knew the items in his car were stolen, defendant was pulled over at night in a car missing a front license plate; in the car were found numerous personal items that appeared to have been stolen, including purses, jewelry, five laptop computers, sports memorabilia, air soft guns, and a night-vision monocular. The deputies also found two pair of black gloves, two ski masks, a pair of binoculars, an extension ladder and a black sweatshirt.

The logical, natural, and reasonable inference to be drawn from the 2007 incident is that, in general, defendant knows a car full of stolen personal items when he sees one. More specifically, given the evidence that in 2007 defendant knew that the purses, electronics, and jewelry found in a car (missing a front license plate) in which he was pulled over at night were stolen, it is reasonable to infer that in 2008 defendant knew that the purses, electronics, jewelry, sports memorabilia, laptops and other personal items found in a car (also missing a front license plate) in which he was pulled over at night, were also stolen.

We certainly agree with defendant that evidence that an individual on one occasion knew that personal items in his possession were stolen does not, *by itself*, substantially tend to prove that he knew the personal items in his possession on a second occasion were stolen. However, the mere knowledge that items in his possession were stolen is not the only similarity between the 2007 incident and the 2008 incident. As

described above, the nature and variety of the items found on each occasion were similar. Also similar were the circumstances under which the vehicle in each incident was pulled over—at night, with a missing front license plate, and with the presence of items that could reasonably be viewed as being helpful in committing a residential burglary.

Given this logical nexus between the 2007 incident and defendant's assertion at trial that he did not know the items in the 2008 incident were stolen, we cannot say that defendant has carried his burden on appeal to establish that the trial court abused its discretion when it granted the People's motion to admit the evidence of the 2007 crime under section 1101(b).

Defendant also argues the prior conviction should have been excluded under Evidence Code section 352 because its prejudicial effect outweighed its probative value. "The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, . . ." (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) " 'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*." ' " (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214)

Any emotional bias that the challenged evidence may have evoked in the jury simply did not substantially outweigh the probative value of the evidence. Defendant's prior crime was highly probative of his present knowledge; that is, that defendant knew the goods he carried in his vehicle were stolen. There simply was no "undue prejudice." The testimony was relevant to the knowledge element and permissibly damaging.

2. *Prosecutorial Misconduct and Evidence of Burglary*

Defendant argues the trial court erred when it allowed the prosecution to argue that defendant was the burglar who had stolen the items from the victims' home. Defendant also charges the prosecutor with misconduct for offering inadmissible evidence of the "burglar tools" found in defendant's car.

During closing argument, the prosecutor discussed the evidence that tended to prove defendant knew the items in his car were stolen. The prosecutor pointed to defendant's previous conviction for receiving stolen goods and to the personal nature of the items that were found in his car in this matter. The prosecutor then said, "The evidence does not point to Mark taking the property or somebody else even taking the property. The circumstantial evidence that you have seen is actually that the defendant and Mr. McMillan took the property." The defense then objected and moved for a mistrial, based on "facts not in evidence" and "misstates the evidence designed to inflame the jury." The trial court denied the objection, ruling, "She can argue anything she wants from the facts if they present some reasonable conclusion, including the possibility of being uncharged."

We conclude that the trial court ruled correctly. " '[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]' " (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) That defendant and McMillan may have stolen the items they were found with, instead of having acquired them from someone else, was a reasonable inference from the evidence that they possessed very recently stolen items and had no plausible explanation for how they obtained them.

Regarding the mention of "burglar tools" in front of the jury, the prosecutor asked the arresting deputy in the People's rebuttal case whether "Based upon your training and experience, those items that you found in the vehicle that I just listed [gloves, mask, binoculars, night-vision binoculars], do those have any significance to you?" This question elicited the answer: "Commonly used by burglars." Defense counsel objected and the trial court sustained the objection. The trial court struck this testimony and stated, "It goes out. They're just tools." Immediately after, outside the presence of the jury, the defense moved for a mistrial, which the trial court denied without comment.

In this appeal, defendant asserts that "the prosecutor committed misconduct by offering clearly inadmissible evidence of the 'burglar tools' and that [defendant] was the burglar." Again, we disagree because the prosecutor ceased questioning the deputy about the tools once the trial court made its ruling, and there is no evidence that the prosecutor intentionally sought to introduce inadmissible evidence. Simply asking the question in the first place did not constitute misconduct. " ' "Although it is misconduct for a

prosecutor intentionally to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct." ' [Citation.] Nothing in the record suggests the prosecutor sought to present evidence []he knew was inadmissible. [Citation.] The prosecutor only asked the question once and did not repeatedly ask it to berate [the witness] or . . . in an attempt to inflame the passions of the jury. [Citation.] . . . The prosecutor's sole question was neither deceptive nor reprehensible, and did not constitute misconduct." (*People v. Hawthorne* (2009) 46 Cal.4th 67, 98.) Similarly, we see nothing in the record from which to infer this prosecutor acted from such improper motives. To rule otherwise, without more evidence of intent on the part of the prosecution, would put prosecutors at risk of charges of prosecutorial misconduct any time a court sustains an evidentiary objection by the defense at trial.

In any case, the trial court did strike that testimony and later instructed the jury: "If I ordered testimony stricken from the record, you must disregard it and you must not consider it for any purpose." When the trial court sustains an objection and instructs the jury to disregard an improper comment, absent the defendant's contrary showing, it must be presumed the jury will follow the admonishment, and any prejudice is thereby avoided. (*People v. Michaels* (2002) 28 Cal.4th 486, 528.)

DISPOSITION

The conviction is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.